

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
Marshall Johnson
LeRoy Koppendrayer
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Xcel's Petition for Approval of
a City Requested Facilities Surcharge Rider

ISSUE DATE: September 21, 2001

DOCKET NO. E-002/M-99-799

ORDER APPROVING XCEL'S CITY
REQUESTED FACILITIES SURCHARGE
RIDER WITH MODIFICATIONS AND
REQUIRING COMPLIANCE FILING

PROCEDURAL HISTORY

On June 7, 1999, Northern States Power Company-Electric Utility, now d/b/a as Xcel Energy, (NSP or Xcel or the Company) filed a petition for approval of a change to its Electric Rate Book to establish a City Requested Facilities Surcharge Rider (CRFS Rider) and other related miscellaneous tariff changes to the General Rules and Regulations section of its Electric Rate Book. This proposal was to create a mechanism by which the Company would be able to recover its costs from customers within a city, which requests or mandates special electric facilities. The filing was made in response to a Minnesota Court of Appeals decision in NSP v. City of Oakdale (Oakdale Decision).¹

On July 2, 1999, the Cities of Sunfish Lake and South St. Paul requested that this filing be referred to the Office of Administrative Hearings for a contested case proceeding.

Comments were filed by the City of Sunfish Lake on August 5, 1999. The Department of Commerce (DOC), the Suburban Rate Authority (SRA), the City of South St. Paul, and the Power Lines Task Force (PLTF) filed comments on August 6, 1999. On August 24, 1999 the Energy Cents Coalition (ECC) filed comments. On August 26, 1999, reply comments were filed by the DOC, SRA, League of Minnesota Cities (LMC) and Xcel.

On February 8, 2000, Xcel filed a partial offer of settlement. The settlement was between SRA and Xcel and was a resolution of several concerns raised by SRA as well as LMC and the DOC, although only the SRA and Xcel were involved in settlement negotiations. There were two issues that remained in dispute.

¹ 588 N.W.2d 534 (Minn. Ct. App. 1999).

On March 6, 2000, the PLTF and the DOC filed comments on the remaining disputed issues. The PLTF also filed comments in opposition to the settlement offer and recommended that the Commission order a contested case hearing.

On April 13, 2000, the Commission met to consider this matter. At the request of the Metropolitan Council and the Cities of St. Paul and Minneapolis, the Commission delayed any decision to allow further discussion and established a time line for further comments.

On May 12 and 26, 2000, Xcel submitted status reports. In the May 26, 2000 filing Xcel agreed not to seek reimbursement of light rail transit costs through its proposed CRFS mechanism.

On June 7, 2000, the PLTF, the Metropolitan Council, the SRA and the Cities of St. Paul and Minneapolis submitted comments. On June 14, 2000, Xcel, the SRA and the DOC submitted reply comments.

Between October 17 and 23, 2000, comments were filed by PLTF, City of Sunfish Lake and the County of Chisago.

On November 14, 2000 Xcel filed an Amended Petition. This filing proposed changes to the Xcel petition and proposed Electric Rate Book revisions originally filed on June 7, 1999 as well as to the partial offer of settlement submitted by Xcel and the SRA on February 8, 2000. Specifically, Xcel proposed that the CRFS Rider be used only to recover the costs of distribution facilities being undergrounded where requested or ordered by a city, acting under its police powers, where the city elects not to prepay the costs.

On December 26, 2000, the PLTF filed initial comments on the amended petition. On January 5, 2001, the DOC, the SRA, the Metropolitan Council, and the Cities of St. Paul, Minneapolis, and Lindstrom also filed initial comments on the amended petition.

On February 16, 2001, the County of Chisago, the Metropolitan Council, the SRA, the DOC, Xcel and the City of Minneapolis filed reply comments.

On June 4, 2001, Xcel filed a notice of agreement with the DOC indicating that it had accepted the DOC recommendations, with a few minor exceptions.

On June 22, 2001, Xcel filed a Notice of Changes to its June 4, 2001 Notice of Agreement. The changes addressed certain housekeeping issues and as a result of discussions with the Department of Transportation (DOT) Xcel removed the term “governing body” from certain sections of the tariff.

On June 25, 2001, the SRA, Metropolitan Council, DOC, PLTF, DOT and the Cities of St. Paul and Minneapolis filed comments on the Notice of Agreement.

The matter came before the Commission on August 2, 2001.

FINDINGS AND CONCLUSIONS

I. Background

Xcel's tariff governs the process by which the Company will recover the costs of special facilities requested by customers and municipalities when those costs exceed the costs of standard facilities.

Prior to the Oakdale Decision, when a customer requested or a city mandated a special installation, Xcel's tariff required a financial "contribution in aid of construction" to offset the incremental cost of the conversion. If a private individual or a city requested a special installation, Xcel required that the individual or the city requesting the special installation prepay the incremental costs of such an installation.

In 1999, however, the Minnesota Court of Appeals, in the Oakdale Decision (addressing Oakdale's ordinance, pursuant to its police powers, that distribution facilities be undergrounded): 1) upheld the ordinance passed by the City of Oakdale, 2) held that the existing tariff was unenforceable to the extent it required compensation for the City's valid exercise of its police power and 3) said that Xcel may request that the Commission allocate the costs of undergrounding to the appropriate group of ratepayers.

It was in response to the Oakdale Decision that the Company made its initial filing on June 7, 1999. The Company has since revised the filing several times in response to parties' comments. This Order will address the proposal in its final form, which was filed on November 14, 2000 and revised for the last time on June 22, 2001. The main issue arising from Xcel's proposal is who should pay for Xcel's incremental costs when a city orders Xcel to underground distribution facilities: residents of the city that so ordered or all of Xcel's ratepayers, potentially, through rate adjustments.

II. Summary of Xcel's Request

Xcel's current proposal would establish an automatic recovery mechanism for the incremental costs associated with a city's request, under its police powers, for undergrounding of distribution facilities when the city declined to pay the incremental costs. In this situation, the proposed tariff would allow Xcel to automatically surcharge its customers in the city making the request.

The current proposal is much narrower in its applicability than the initial petition. In the current proposal the CRFS Rider would be used only to recover the costs of distribution facilities being undergrounded where requested or ordered by a city where the city elects not to prepay the costs. This is a change from the initial proposal in that the CRFS Rider would only apply to distribution facilities, not transmission facilities, and would apply only to undergrounding distribution facilities when a city was operating under its police power and declined to pay the incremental costs. Xcel's recovery in this specific situation would not require Xcel to come before the Commission for approval but would allow Xcel to automatically surcharge its customers in the city making the request. For other special facilities, and under other circumstances, Xcel would have to get Commission approval in order to recover the incremental costs through an electric rate surcharge.

Xcel's proposal provides that a city would receive notice of the incremental costs associated with a distribution undergrounding project and could then elect to prepay or allow recovery through the CRFS mechanism. For other projects, the affected municipality would receive notice of any rate filing with the Commission to recover special facility costs by surcharge from the customers in the municipality. The municipality could then oppose or recommend modifications to the Company's cost recovery proposal.

The proposal is based on the philosophy that the Company will install special facilities upon request, but the customer, group of customers, developer or municipality requesting the extra costs should bear those costs to avoid cost shifting to other ratepayers.

III. Comments of the Parties

A. Suburban Rate Authority and the Cities of Richfield and Oakdale

The Suburban Rate Authority and the Cities of Richfield and Oakdale (SRA/Cities) stated they did not oppose the adoption of a tariff on the limited issue of surcharges for underground distribution facilities as special facilities. They argued, however, that the tariff should require Xcel to affirmatively prove entitlement to a surcharge on any project carried out pursuant to a city's police power other than undergrounding distribution lines that the city accepts as surchargeable.

The SRA/Cities argued that Xcel's tariff should contain an appeal procedure that would allow a city to object to a proposed surcharge for the undergrounding of distribution lines as well as to the rate design or amount claimed by Xcel as the incremental cost, and to the special facilities designation. The appeal process proposed by SRA/Cities states:²

3. Where undergrounding of Distribution Facilities as a Special Facility is ordered by a City, and payment for excess expenditure is not made or arranged by the City, the Excess Expenditure will be recovered from the Company's customers located in the City through a rate surcharge set forth in Section 5.3 F and the City Requested Facilities Surcharge Rider, subject to the following conditions:
 - a. The Company shall provide written notice to the City containing the following:
 - i. the estimated total excess expenditures required for the designated City undergrounding project and an estimate of the resulting surcharge;
 - ii. notice to the City Clerk that the City has sixty (60) days from its receipt of the notice to file with the Commission an objection to the proposed surcharge under Minnesota Statutes, Section 216B.17 or other applicable law. The notice shall contain a brief statement of facts and tariff or other legal authority on which the Company bases its right to surcharge the ratepayers located in the City,

² Modifying Section 5.3.E.3 of Xcel's proposed Electric Rate Book Changes.

- b. Within the sixty (60) day period noticed by the Company, the City may give written notice to the Company of its intention to pay all, a portion or none of the estimated Excess Expenditures, or otherwise enter into an agreement with the Company regarding payment of any Excess Expenditures. If the City does not respond in writing within the sixty (60) days, it is deemed to have elected not to pay any portion of the Excess Expenditures and will have waived its right to object to the Company's right to surcharge ratepayers in the City for the Excess Expenditures. Such failure, however, is not a waiver of the City's right to object to the Company's Excess Expenditures surcharged to ratepayers in the City, which objection may be exercised pursuant to section 5.3 F6, or other applicable law.
- c. The City may bring its objection to the proposed surcharge to the Commission by filing a statement of objection with the Commission and serving the Company within sixty (60) days. An objection proceeding shall not halt or delay the project, except for good cause shown. Notice and implementation of the surcharge shall be stayed until the Commission or a court of competent jurisdiction issues a final order or judgement.
- d. Nothing in this tariff is intended to establish or limit the rights of a Company customer that is a member of the class of customers surcharged or proposed to be surcharged from pursuing its rights under applicable law.
- e. Customers in the applicable City will be notified of: (i) the implementation of a City Requested Facilities Surcharge either through a bill message or a bill insert during the month preceding the month the surcharge is commenced; and, (ii) any change in a preexisting surcharge. The Notification described in (i) and (ii) shall be approved by the Department. The Company shall provide the Department and City the proposed notice to customers no less than sixty (60) days prior to the first day of the month in which the Company intends to notify customers of the surcharge.³

SRA/Cities also recommended that "Standard Facility" be defined. They argued that the definition was unclear and as a result the definition of "Special Facility" left too much discretion to the Company.

The SRA/Cities recommended that the title "Underground Facilities Surcharge" was a more accurate name for this surcharge in that it identifies the type of cost but does not identify the entity causing the cost as either Xcel or the city. They argued that the costs associated with the surcharged facilities under this tariff could only result from undergrounding distribution facilities and that Xcel, not the city, was choosing to surcharge customers within a jurisdiction ordering the special facility rather than incurring a general expense.

³ June 25, 2001 comments of the SRA and Cities of Richfield and Oakdale, pages 2 and 3, on Xcel's proposed tariff.

B. Metropolitan Council

The Met Council argued that the tariff was confusing and uncertain in its application and should be rejected. Specifically, the Met Council found that the definition of special facilities offered little or no guidance as to what actually constitutes special facilities. Further, the Met Council argued that the proposed tariff gives Xcel the sole authority to determine what is a special facility.

The Met Council was concerned how the new tariff would be applied to the Council's public works projects, including light rail, general transit or any other project. It argued that the proposed petition was in conflict with the Commission's Right of Way Rules.⁴ The Council was concerned that Xcel was attempting to circumvent applicable law through miscellaneous tariff changes.

The Council also argued that the amended petition was in conflict with the Oakdale decision. The Council took the position that the Oakdale Court supported that a city may exercise its police powers without being required to pay compensation. It argued that the Court indicated that the only time a utility could recover costs from a taxpayer benefitting from undergrounding was if it was for mere convenience or aesthetic reasons.

For these reasons, the Council argued, any decision to impose a surcharge upon the residents of a city requesting undergrounding should be based upon a factual record made by the Commission, rather than allowing Xcel to unilaterally impose a surcharge upon the residents.

Further, the Met Council indicated that it had an immediate concern that the surcharge would be used to surcharge city residents for undergrounding of electric lines associated with light rail construction.

C. Chisago County

Chisago County was concerned that the tariff proposed by Xcel would not only apply to distribution facilities but could be used to recover costs for undergrounding of transmission facilities. Chisago argued that while it appears that Xcel is talking about a recovery tariff, it is really talking about two tariffs in the tariff language. One is the CRFS Rider to be used to recover the costs of distribution facilities, but the other is a revised general tariff to be used to cover the costs of transmission facilities. For this reason Chisago recommended that references to transmission facilities should be deleted from the tariff.

D. City of Minneapolis

The City of Minneapolis stated its agreement with the comments of the Metropolitan Council, the joint comments of the Suburban Rate Authority and the Cities of Richfield and Oakdale, and the City of St. Paul.

⁴ Minn. Rules Part 7819.0050-7819.5100.

The City summarized its position on this tariff as follows:

costs of the power system should not be billed to the transportation system;

the authority of cities and other governmental units to manage their rights-of-way and change or renew methods of transportation on those rights-of-way should not be impaired;

customers located in particular cities should not be selectively tarified for utility relocation orders when those orders are consistent with the authority given to governmental units by Public Utilities Commission rules and specifically by Minnesota Rules 7819.3100 and 7819.3200;

any undergrounding tariff that singles out a customer for extra charges because the customer lives in a particular political unit should only be permitted upon establishment that there is a benefit to the customer because they are in that particular political unit.

In addition the City argued that the concepts of “non standard facilities” are not reasonably defined, that the notice provisions are not adequate, and that a rate which has no connection to benefit but which singles out certain power customers based only upon political boundaries is not reasonable and is discriminatory.

E. The City of St. Paul

The City argued that the petition improperly includes limitations on St. Paul’s authority that are inconsistent with Commission rules that govern municipal authority over rights-of-way and infringes on the City’s right to exercise its police powers.

The City supported the comments and positions presented by the Suburban Rate Authority and the Cities of Oakdale and Richfield. It supported the appeal process set forth by the SRA. Further, it argued that the tariff is deficient due to its failure to define a “standard facility” and accordingly a “special facility” and that the tariff title “City Requested Facilities Surcharge” is misleading and inappropriate.

F. Cities of South St. Paul, Sunfish Lake and League of Minnesota Cities

The cities of South St. Paul and Sunfish Lake requested that this matter be sent to the Office of Administrative Hearings for contested case proceedings. This request was made prior to the Amended filing by Xcel.

The League filed its comments prior to the November 14, 2000 amendment by Xcel. It indicated that it agreed with the concerns and objections raised by the SRA. It argued that the Commission should confine its decision to the issues raised by the Oakdale Decision so as not to interfere with local governments’ exercise of their police power authority.

G. City of Lindstrom

The City of Lindstrom indicated that its position is that the cost of any facility, be it power plants, transmission lines and/or distribution lines, should be borne by those parties directly benefitting from said improvement. The City’s comments asked the Commission to consider its situation regarding a transmission line upgrade being proposed by Xcel.

H. Power Line Task Force

The Power Line Task Force has been and continues to be interested in higher voltage transmission lines. Its comments indicated concern that even though Xcel has narrowed the focus to address the undergrounding of distribution facilities only, the proposed tariff, as written, requires the political subdivision to bear the costs of moving or burying transmission lines irrespective of the circumstances.

The PLTF filed a petition with over 250 signatures requesting that this matter be sent to the Office of Administrative Hearings for a contested case proceeding.

I. Energy Cents Coalition

The Energy Cents Coalition opposed Xcel's recovery mechanism and supported the petition of the SRA and the cities of Richfield and Oakdale. ECC argued that a rate design based on energy usage would relate better to the number of people in a residence or employed at a given structure. It argued that Xcel's rate design would put a disproportionate burden on low and fixed income ratepayers.

J. Department of Commerce

The DOC argued that Xcel's proposal should be accepted with certain recommendations which will be addressed below. The DOC stated that its recommendations were designed to avoid requiring ratepayers, who reside outside a city that orders that distribution be undergrounded, to bear the risk of paying for such costs in a subsequent rate case; and to mitigate the effects of the CRFS Rider on ratepayers residing in such cities.

The DOC, after reviewing Xcel's proposal, concluded that cities have a right to exercise their police powers; however, the ratepayers residing outside the city's jurisdiction should not be at risk to bear the costs, in a subsequent rate case, of the city's actions. It is more appropriate, the DOC argued, that those who cause the costs should pay for them.

The DOC, in response to the parties that argued that Xcel's proposal was not in compliance with the Oakdale Decision, argued that the decision does not conclude that Xcel has no right to recover the costs associated with a city's decision. Rather, the decision states that Xcel may "request that the Commission allocate the additional costs of undergrounding to the appropriate group of ratepayers."⁵ For this reason the proposed tariff does not conflict with the Oakdale decision.

The DOC also argued that the proposal does not conflict with the Commission's Right of Way Rules. Xcel's tariff indicates that it will move its facilities to the extent necessary to avoid interference with construction pursuant to an order or request of the governing body. This language does not prevent the governing body from exercising its rights and is consistent with the right-of-way rules. Further, the DOC argued that the rules indicate that the entity requiring such action by the right-of-way user is not required to pay the right-of-way user directly for the costs but the rules do not preclude the right-of-way user from recovering the costs from ratepayers under the Commission's jurisdiction.

⁵ NSP v. City of Oakdale, 588 N.W.2d 543 (Minn. Ct. App. 1999).

The DOC agreed with the other parties that Xcel needs to define special facilities more specifically. To meet that end, the DOC recommended that Xcel make a compliance filing with the Commission to include:

a description of the procedures Xcel will use (including any forms that will be used) to determine whether a facility or installation is standard or special;

an explanation of how Xcel will calculate the cost differences between standard and special facilities;

tariff language that incorporates these methods of determining the differences between standard and special facilities. This language should describe the procedures Xcel will use to determine whether a facility is standard or special.

The DOC made numerous recommendations that were accepted by Xcel in its November 14, 2000 CRFS Rider and its Notice of Agreement of June 4, 2001 and its June 22, 2001 Changes to its Notice of Agreement. Additional recommendations by the DOC included:

Xcel, in keeping with its commitment of May 26, 2000, should be prohibited from seeking automatic surcharge recovery of light-rail transit cost through the City Requested Facilities Surcharge Rider;

there should be no contested case proceeding on the merits of the surcharge;

The Commission should not open a separate docket to determine statewide standard distribution and/or transmission installations;

the comments of the City of Sunfish Lake, the County of Chisago, and the City of Lindstrom are beyond the scope of the instant filing

IV. Commission Action

The Commission will approve Xcel's amended petition of November 14, 2000 with the Notice of Changes to the Agreement of June 22, 2001. The Commission recognizes that a city has a right to order Xcel to underground distribution facilities when acting within its police power and that Xcel has a right to seek recovery of its incremental costs associated with any such orders. It is reasonable, equitable, and consistent with past practice for Xcel to recover these costs from the ratepayers whose municipalities required them, instead of from the general body of ratepayers.

Xcel's proposal, which provides for a surcharge to the residents of a city that so orders, if the city declines to pay the incremental costs, is very limited in scope. The tariff allows an automatic surcharge to city residents only where a city orders undergrounding of distribution facilities. Xcel would be required to file a separate petition with the Commission to seek reimbursement of other types of special facilities.

The Commission agrees with the DOC that the proposed tariff, as amended, is consistent with the Oakdale Decision and does not infringe on a city's police power authority. The Oakdale Decision concludes that a city has the authority to act in its police powers and require undergrounding of

distribution facilities. However, the decision does not conclude that Xcel has no right to recover the costs associated with such orders by a city. The Oakdale Decision specifically states that “... NSP may request that the commission allocate the additional costs of undergrounding to the appropriate group of ratepayers.”⁶

The Commission also agrees with the DOC and other parties that the definition of “special facilities” needs to be clarified. To do so, the Commission will require Xcel to submit a compliance filing describing the procedures Xcel will use to determine whether an installation is standard or special, explaining its calculations of cost differences between standard or special facilities and submitting tariff language that incorporates these items.

Further, the Commission recognizes the need for a clear and precise notice and appeal procedure that allows parties to bring to the Commission objections to a surcharge under this tariff. The Commission will order Xcel to incorporate in its tariff the appeal procedure set forth in the June 25, 2001 comments of the SRA/Cities on pages 2 and 3, and as set forth in Section III A of this Order.

Since Xcel’s proposal has been modified from its original proposal to cover only distribution facilities, the Commission will not, at this time, address the issues surrounding transmission lines. For this reason, the Commission finds that the comments of the City of Sunfish Lake, the County of Chisago and the City of Lindstrom, relating to transmission lines, are beyond the scope of this filing.

The Commission recognizes the concern expressed by some commentators that some applications of the proposed tariff could conflict with the Commission’s Right of Way Rules. The Commission will address this issue if and when it arises in specific cases. Further, the Company has assured the Commission and all parties that it will not attempt to use the CRFS Rider to recover the costs of relocating facilities to permit light rail transit construction. The Commission agrees that would be an inappropriate use of the rider and will order that it not be used in the light rail context.

The PLTF, and the Cities of Sunfish Lake and South St. Paul, in their early filings, requested that this matter be referred to the Office of Administrative Hearings for contested case proceedings. As discussed herein, the proposal under consideration is narrowly drawn and the issues raised are not questions of material fact but rather issues of policy within the purview of the Commission. Under the proposed tariff the parties have the opportunity to bring disputes to the Commission. At that time any referral for contested case procedures will be addressed, if appropriate. For these reasons the Commission will not order a contested case proceeding on the merits of the surcharge proposal.

Finally, the Commission is not persuaded that it is reasonable or necessary at this time to open a separate docket to determine statewide standard distribution and/or transmission installations.

⁶ Ibid at 543.

ORDER

1. Approve the June 22, 2001, Notice of Changes to Agreement with the DOC and the November 14, 2000 City-Requested Facilities Surcharge Rider with the following modifications:
 - Xcel, in keeping with its commitment of May 26, 2000, is prohibited from seeking automatic surcharge recovery of light-rail transit costs through the City Requested Surcharge Rider;
 - proposals to open a separate docket to determine statewide standard distribution and/or transmission installations are hereby denied;
 - Xcel shall submit the following information, as a compliance filing within 60 days from the date of this Order:
 - a description of the procedures Xcel will use (including any forms that will be used) to determine whether a facility or installation is standard or special;
 - an explanation of how Xcel will calculate the cost differences between standard and special facilities;
 - tariff language that incorporates these methods of determining the differences between standard and special facilities. This language should describe the procedures Xcel will use to determine whether a facility is standard or special.
 - Xcel shall establish within the tariff an appeal process, as set forth on pages 2-3 in the June 25, 2001 filing by the Suburban Rate Authority and set forth in Section III A of this Order.
2. Xcel shall file, within 30 days from the date of this Order, modifications to its existing general rules and regulations on special facilities.
3. The authority to vary time lines and establish comment periods is hereby delegated to the Executive Secretary.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).